(2)

No. 03-1056

IN THE

Supreme Court of the United States

LUANNE WALTON,

Petitioner,

v.

JOHNSON & JOHNSON SERVICES, INC., and ORTHO-MCNEIL PHARMACEUTICAL, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether an employer is entitled to the affirmative defense established in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) when the plaintiff's failure to report promptly leads to greater harm?

CORPORATE DISCLOSURE STATEMENT

Respondent Ortho-McNeil Pharmaceutical, Inc. and Johnson & Johnson Services, Inc. are not publicly held companies, and their ultimate parent corporation, Johnson & Johnson, is a publicly held company. However, no publicly held entity owns more than 10% of the stock of Johnson & Johnson.

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STATUTE

42 U.S.C. § 2000e, *et seq.* 1-2

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STATEMENT OF THE CASE

The petition seeks review of a decision of the Eleventh Circuit Court of Appeals, affirming summary judgment for Respondent Ortho-McNeil Pharmaceutical, Inc. ("Ortho"), on petitioner Luanne Walton's ("Walton") claim that she had been subjected to sexual harassment in violation of Title VII

of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* ("Title VII").[1] The petition should be denied.

A. Introduction

Petitioner, Walton, who was a sales representative for Ortho from 1989 through 1999, alleges that she was sexually harassed by her supervisor, George Mykytiuk.[2]

The Court of Appeals held that the district court correctly had found that the *Ellerth/Faragher* affirmative defense was available to Ortho and correctly had applied it to find no liability on the part of Ortho. To understand why the Court of Appeals' decision involved the typical application of the principles announced in *Ellerth* and *Faragher* and requires no further review, it is important to first review the critical uncontested facts. Immediately after Walton complained to Ortho's human resources department on September 7, 1999, that Mykytiuk had tried to hug and kiss her, Ortho did precisely what this Court has said an employer should do: it responded promptly and acted effectively to prevent any future harassment. It ensured that Walton never had to work with Mykytiuk again. After Mykytiuk was interviewed as part of the investigation of Walton's complaint on September 13, 1999, he was suspended from all duties, and he moved to Michigan, thus guaranteeing her a safe and secure workplace. Her later decision in May of 2000 to elect long-term disability benefits over returning to work was not a

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[1] Walton also brought a claim for retaliation under Title VII; claims for sexual harassment and retaliation under the Florida Civil Rights Act; and claims for intentional infliction of emotional distress and negligent hiring, supervision, and retention under Florida common law. None of these claims are at issue in the petition.

[2] Mykytiuk was a defendant below, but was dismissed, pursuant to a settlement agreement with Walton. Johnson & Johnson Services, Inc., is a "sister" subsidiary corporation to Ortho. Walton presented no record evidence that she ever was employed by Johnson & Johnson.

"tangible employment action" culminating from an act of sexual harassment. Therefore, it was not sufficient to deprive Ortho of the affirmative defense to liability for its having acted promptly.

At the outset, it is important to note that Walton consistently and emphatically has argued that "constructive discharge" is *not* at issue in her case. Nevertheless, Walton attempts to "piggy-back" her case onto what she admits is the "analytically distinct" question of whether "constructive discharge" constitutes a tangible employment action—the question that will be answered by the Court in its review of *Suders v. Easton*, 325 F.3d 432 (3d Cir.), *cert. granted*, 124 S. Ct. 803 (2003). In her petition, Walton herself highlights the stark contrast of the facts of *Suders* to the undisputed fact in this case that, when Walton opted not to return to work in May of 2000, Mykytiuk had been out of the workplace for eight months. Therefore, she could not base her case on the theory that her workplace was intolerable. It was the workplace in which she had prospered for ten years prior to Mykytiuk's employment, and one from which he was long gone.

Indeed, the appropriateness of certiorari review in *Suders* provides a significant contrast to the instant case. The issue of constructive discharge raised in *Suders* is a recurring matter of deep division in the federal courts. The issue presented by Walton in the unusual factual circumstances and legal posture of her case is not. Accordingly, this case does not warrant review on its own merits and should not be consolidated with *Suders* or held for possible remand in light of the *Suders* decision.

B. Ortho Responded Promptly and Effectively to Walton's Complaint

1. *September 3, 1999, Anonymous Complaint to Ortho's Human Resources Department*

On September 3, 1999, Walton invoked Ortho's anti-harassment policy that was published in her copy of the Ortho Employee Handbook, by anonymously calling Ortho's Human Resources Department.[3] She had a copy of that handbook at her home in Tampa, Florida. Walton told human resources representative Angela Taylor, who answered the call, only that she had an over-attentive district manager who had tried to kiss and hug her on one or two occasions. Walton declined to identify herself or her supervisor. Taylor invited Walton to make a formal complaint, but Walton declined to do so on that call, saying that she knew her district manager would be "toast" if she did. Taylor asked Walton to take the weekend to consider the matter and make a formal complaint, but she advised Walton that, even if she would not do so, Taylor had learned enough from their conversation to identify the parties and initiate an investigation, and she would do so.

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[3] Ortho's anti-harassment policy unequivocally prohibits sexual harassment; describes the types of behavior prohibited; provides that complaints of harassment should be made to the employee's supervisor, manager, or an Organizational Effectiveness Representative in Human Resources; explains that complaints will be handled and investigated by Human Resources; provides that violators will be disciplined; and ensures no retaliation against a complaining employee. Ortho publishes this policy as part of its employee manual (which is distributed to all employees), reminds employees of the policy annually through a letter from Ortho's president, offers employees a human resources hotline to report complaints, and trains its managers in sexual harassment prevention. Walton repeatedly, on pages 12, 13 and 14 of her petition, excuses her own failure to invoke this policy earlier by pretending that her supervisor's kissing her and grabbing her breasts and buttocks was not "actionable" behavior or "a violation of Title VII." This employer's policy is unequivocally neither that restrictive, nor that naïve.

On Monday, September 7, 1999, Walton called Taylor and identified Mykytiuk as the offending district manager. She made no further allegations than the hug and kiss attempts that had occurred three months earlier, did not tell Taylor of that delay, and did not mention the grabbing of her breasts or buttocks. Taylor told Walton that she would turn the matter over to Renee Ralph, the human resources manager assigned to Walton's organization (who was on vacation through the Labor Day holiday weekend).

2. *Immediate Response*

Taylor called Ralph immediately after Walton's call, and Ralph called Walton the same day to set up an appoint ment for an interview in person. Three days later, on September 10, 1999, Ralph traveled to Tampa, Florida, and spent several hours interviewing Walton. Walton also gave Ralph a typewritten account of her complaints. Again, she reported only that Mykytiuk had paid excessive attention to her and tried to hug and kiss her on a couple of occasions.[4]

On September 13, 1999, when Ralph questioned Mykytiuk at length, he gave Ralph a completely different view of his relationship with Walton, claiming that he and Walton had had an intense and entirely consensual love affair that included repeated acts of sexual intercourse, sometimes at Walton's initiation. At the end of the interview, Mykytiuk was suspended from duty.

Mykytiuk never returned to work for Ortho. He moved from Tampa back to Michigan in October 1999 after he had

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[4] As will be developed later in this Statement of the Case, Ortho's investigation took on a different character when Walton claimed two weeks later, after learning that details of a sexual relationship between her and Mykytiuk would be become public record in Mykytiuk's divorce proceeding, that Mykytiuk actually had raped her on two occasions in late June and early July.

been suspended, and he was later formally discharged by Ortho.

3. *Ortho's Repeated Attempts to Return Walton to Work*

During the entire time period that she allegedly was being harassed by Mykytiuk, and up until her complaint to Human Resources on September 7, 1999, Walton had worked in the same position with the same pay and benefits. Walton admits that, during the time period of the alleged harassment, Mykytiuk never threatened her job. Ortho eliminated any possibility that Mykytiuk's harassment could culminate in a tangible employment action by promptly suspending him in connection with Walton's initial complaint.

Shortly after Walton made her complaint to human resources, however, she went on leave and began collecting short-term disability benefits under Ortho's disability plan. By November 1999, Ralph had repeatedly invited Walton to return to work with complete assurance that she would not be exposed to Mykytiuk. Walton refused, claiming by that time that, because of her psychic injury, she was unable to work.[5]

In January 2000, Ralph invited Walton and her husband to New Jersey for a briefing on the close of their investigation. Ralph and Alan Saleeba, Johnson & Johnson's Director of Security, informed the Waltons that they could not conclude from their investigation that Walton had been a victim of rape, and that they were unable to exclude the possibility that Walton and Mykytiuk had simply had a consensual love affair that ended. The Waltons were furious and demanded to see the Chairman of Ortho's parent company, Johnson & Johnson. Instead, they met with the chief human resources officer for Johnson & Johnson, Michael Carey.

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[5] Actually Walton's treating psychiatrist at the time recommended she return to work, but Walton disagreed.

Carey assured the Waltons of his confidence in the integrity of the investigation, but offered Walton any assistance he could provide to ease her return to work, including the possibility of placement with another Johnson & Johnson company and in another geographic location, if she so desired. (Her husband was an Air Force officer, subject to transfer.) Walton never responded to Carey's offer, or to his follow-up offer a week later.

Walton never again returned to work at Ortho, although she took advantage of serial disability programs provided by Ortho as a benefit of her employment. In May of 2000—ten months after the alleged rapes, and eight months after Walton had complained and Mykytiuk had left the workplace, Ortho informed Walton that, as of May 16, 2000, she would exhaust the 26-week short-term disability benefit under Ortho's plan. The letter gave Walton the opportunity to return to work or to have her active employment status terminated so that she could apply for long-term disability benefits under Ortho's disability plan. It also invited her to seek reemployment with assistance when she was able. Walton elected long-term disability benefits over returning to work. Based on her then current doctors' reports, she was approved. She obtained these benefits continuously until February 2002, when her doctor said she was no longer disabled.

These undisputed facts of Ortho's prompt and effective remediation of Walton's harassment complaint describe a textbook case for application of the *Ellerth/Faragher* affirmative defense. Walton nevertheless argues, as she did for the first time in the Court of Appeals by way of reply brief, that the alleged rapes themselves should be considered "tangible employment actions" such that Ortho would not have been entitled to the affirmative defense because no reasonable person would have reported the harassing acts prior to the rape. To understand why the Court of Appeals found her argument to be baseless, it is important to review

the following additional facts, in the sequence as they occurred from April 1999 through December 1999, and as they unfolded from Ortho's investigation of Walton's complaint.

4. *Walton's Initial Complaint Was Based Only on Mykytiuk's Alleged Excessive Attention and Attempts to Kiss Her*

Walton's first contact with Mykytiuk as her new supervisor was in early 1999. By April 1999, they had had some supervisory contact when Mykytiuk "rode with" Walton to observe her sales calls on physician customers in her territory. According to Walton's account, the first significant incident between them was on June 14, 1999, when Mykytiuk accompanied Walton on another "ride-with" to call on physicians. According to her report, they then went to a movie and had dinner together. On that occasion, Mykytiuk began to tell Walton of his personal problems, including an impending divorce from his wife in Michigan. Walton drove Mykytiuk back to his car to let him off. When they arrived, he tried to kiss her. She reports that she told him his behavior was inappropriate. He apologized and promised never to do it again.

On the next day, June 15, 1999, Walton and Mykytiuk met at a Starbucks. Walton then drove Mykytiuk to her house for an inventory of her physician samples, which she kept in her garage. Later, they made office visits, and then Walton drove Mykytiuk to his apartment because he said he wanted to "redo the inventory." After completing the inventory, Mykytiuk again discussed with Walton his disappointment over his impending divorce. As Walton was leaving Mykytiuk's apartment, he told her he was sad and that he needed a hug. As he had the day before, Mykytiuk again tried to kiss Walton. This time, he also grabbed her breasts and buttocks. Walton pushed Mykytiuk away and told him "No,"

and again Mykytiuk apologized. Walton then drove Mykytiuk back to Starbucks to get his car.[6]

It is only some of Mykytiuk's alleged conduct on June 14-15, 1999, that Walton first described for Angela Taylor and Renee Ralph in her telephone calls to them on September 3 and 7, 1999, in her interview with Ralph on September 10, 1999, and in the typed statement she gave Ralph on September 10th. But that conduct is precisely the kind of conduct Ortho's policy prohibits in the employee manual Walton kept at her home. The manual neither requires the employee to evaluate the conduct as "actionable" nor as sufficient to "violate Title VII," and it is clear that both parties acknowledged the conduct as both inappropriate and sexual.

This reported conduct by Mykytiuk, and his account of a voluntary sexual relationship with Walton, led to his suspension on September 13, 1999. But the investigative course changed dramatically because of events occurring on September 17, 1999. On that date, Dr. Kathleen Cervenka, Mykytiuk's and Walton's psychologist, called Walton to inform her that Mykytiuk's wife had subpoenaed Dr. Cervenka's treatment records, which would reveal that Mykytiuk and Walton had had an immature and irresponsible, but entirely consensual, love affair involving repeated sexual

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[6]A couple of days later, Walton, at Mykytiuk's request, went to Mykytiuk's apartment and accepted a key and security code to his apartment. Mykytiuk told her that he needed her to have access to his home office in case he was out of town and needed something faxed to him.

intercourse.[7] Upon receiving this news, Walton told her husband, for the first time, that she had been raped by Mykytiuk. She then called Mykytiuk's wife, Shelly Skinner, in Michigan, and began a collaboration with her in which they would trade information about Mykytiuk to aid each other in Skinner's custody battle and Walton's complaint against Mykytiuk and Ortho.

5. *Investigation of "Rape" Begins*

Three days later, on September 20, 1999, Walton called Mykytiuk's superior, regional manager Cathy Wichert, to inform her, and ultimately Ralph, that she had left out from her reports of September 3rd, 7th, and 10th the fact that Mykytiuk had actually raped her.[8] Ralph returned to Florida to interview Walton further, and heard for the first time additional allegations previously withheld.

Walton told Ralph that, in addition to the "hugs and kisses" in mid-June that she had reported in her initial complaint, on June 29, 1999, she had followed Mykytiuk home from an evening business meeting at a restaurant because he said he was drunk. Despite Mykytiuk's sexual advances two weeks earlier, Walton went upstairs with Mykytiuk to his apartment, and accepted some wine from him as he began talking again about his personal life. According to Walton, after they had

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[7] In July 1999, Walton had learned that Dr. Cervenka was treating Mykytiuk in connection with his divorce remorse, and Walton began to see Dr. Cervenka herself. On July 26, 1999, Walton said she and Mykytiuk visited Dr. Cervenka together in a "conjoint session," during which Walton said she wanted to end her affair with Mykytiuk and restore professional "boundaries." Walton and Mykytiuk made a "30-day agreement," recorded in Dr. Cervenka's clinical notes, agreeing to restore their relationship to a professional level. Walton acknowledged that she never told Dr. Cervenka that Mykytiuk had raped her.

[8] Also on September 20, Walton reported the alleged rapes to the Tampa Police Department. The police department investigated Walton's allegations, and decided not to prosecute the claim.

talked awhile, Mykytiuk jumped on top of her on the couch and raped her. Walton also reported that Mykytiuk later carried her into his bedroom and again forced her to have sex with him. Although she says he showed her a gun, there is no evidence that Mykytiuk used the gun in any way to coerce her.

Walton also told Ralph that, on July 8, 1999, she once again gave Mykytiuk a ride to his apartment after a lunch business meeting. Again, Walton went upstairs and accepted wine from Mykytiuk. Mykytiuk said that Walton needed to relax, and began rubbing her shoulders. He invited her to lie down on the floor so he could rub her back and shoulders. Walton lay down on her stomach on his living room floor; he rubbed her back for awhile and then, she says, he raped her again.

Walton also reported additional alleged harassing behavior to Ralph. According to Walton, on August 21, 1999, she rode with Mykytiuk to a conference in Orlando. During the conference, Mykytiuk invited Walton to his hotel room to review her "good sales numbers." Despite her prior experiences, now including multiple forced rapes, she went to his hotel room, where he hugged and kissed her and touched her breasts and buttocks over her objection. Walton also reported that, on August 26, 1999, after a business dinner, Mykytiuk pressed her for sex and tried to kiss and hug her again.

Walton reported that, the next day, on August 27, 1999, after she gave Mykytiuk a ride home from a business meeting, she went up to his apartment to use the restroom. Walton says Mykytiuk handed her a "Victoria's Secret" catalogue and told her to pick something out for herself.

The investigation also revealed that, during the course of the summer of 1999, Walton had conversations with at least three people about Mykytiuk. In July 1999, Walton advised her close friend, Kim Van Goidstnoven, that Mykytiuk was

paying too much attention to her and had tried to hug and kiss her. Van Goidstnoven consulted with her managers in another company (also a Johnson & Johnson subsidiary). In mid-August, she reported back to Walton that they advised her that Walton should go to the Human Resources Department, consistent with the direction in her employee handbook. Walton also had a conversation with her husband about being concerned over Mykytiuk's excessive attention, and he recommended that she go to Human Resources to report the matter. Finally, she discussed the matter with her neighbor, who also advised her to go to Human Resources. None of these conversations included allegations of rape. Moreover, Walton did not follow the consistent encouragement to report her complaint to Ortho's Human Resources Department during the entire summer of 1999, despite her allegations that Mykytiuk twice raped her and continued to harass her throughout that time.

Ortho's post-September 17, 1999, investigation expanded because of Walton's rape charge. The investigators returned and questioned Mykytiuk again, and he supplied them with detailed information intended to demonstrate that he had shared an intimate relationship with Walton.

Ralph and Saleeba also conducted interviews of multiple other people in an attempt to evaluate Walton's new charge of forcible rape in the context of her behavior and Mykytiuk's descriptions, which seemed consistent with an intimate personal relationship. They concluded that, for some period, Walton and Mykytiuk may have become involved in a sexual affair that was voluntary and welcome, and that Mykytiuk had not been guilty of raping her. The information on which they based this conclusion included confirmation of the intimate details Mykytiuk reported; the peculiar history of Walton's reports; Walton's behavior in accepting a key to Mykytiuk's apartment and repeatedly visiting the apartment even after the alleged rapes; telephone conversations tape

recorded by Mykytiuk's estranged wife Shelly Skinner, in which Walton offered to collude with Skinner in Skinner's child custody dispute with Mykytiuk; the clinical notes of Dr. Cervenka indicating a consensual affair; and the decision by the State of Florida not to prosecute Mykytiuk.

Nevertheless, Ralph and Saleeba recommended to Ortho's vice president for Human Resources that Mykytiuk be discharged because of his poor judgment in taking an employee away from her work for personal gratification and developing a sexual relationship with a married subordinate. Mykytiuk already had been on suspension since September 13, 1999, and was formally discharged on December 31, 1999.

C. The Proceedings Below

After full briefing and oral argument, the United States Court of Appeals for the Eleventh Circuit, in a *per curiam* decision, affirmed the district court's Order granting summary judgment for Ortho on all of Walton's claims. With respect to Walton's sexual harassment claim, the Court of Appeals expressly analyzed the question of Ortho's liability for Mykytiuk's harassment and, specifically, whether Walton's discharge in May of 2000 was a "tangible employment action," under the principles established in *Ellerth* and *Faragher*.

The Court of Appeals found that termination of Walton's employment was a tangible employment action, but that there was no causal link between the harassment and Walton's termination because there was no evidence that Walton was terminated (as opposed to being harassed) because of her sex. The Court of Appeals acknowledged that Mykytiuk's conduct could be imputed to Ortho,[9] but stated that Mykytiuk had played no role in the termination. Accordingly, the Court of

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[9] Ortho conceded this point in the district court solely for summary judgment analysis.

Appeals held that Walton's termination in order to preserve her eligibility for long-term disability benefits did not preclude Ortho from relying on the affirmative defense to avoid liability for the earlier harassment. It then found that both prongs of the affirmative defense were met, and, thus, concluded that Ortho could not be held liable for Mykytiuk's harassment of Walton.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE STANDARDS FOR EMPLOYER LIABILITY ALREADY DECIDED IN *ELLERTH* AND *FARAGHER*

The Court already has addressed, in detail, the standards for employer liability for sexual harassment by a supervisor in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Walton does not and cannot show that the Court of Appeals deviated from those standards, or that there is any argument, appropriately vetted in the lower courts, that requires this Court's attention by way of certiorari review.

As the Court of Appeals recognized, the only basis for Walton's argument in the district court that she suffered a tangible employment action was her removal from active employment status in May of 2000 (eight months after the sexual harassment had ended and Mykytiuk had been removed from the workplace). *Walton v. Johnson & Johnson Services, Inc.*, 347 F.3d 1272, 1283 n.10 (11th Cir. 2003). Walton could not have argued otherwise, given that she undisputedly worked in the same position with the same pay and benefits until she elected to go on short-term disability leave after belatedly complaining of sexual harassment, and given that Ortho eliminated any possibility that Mykytiuk's harassment could culminate in a tangible employment action by promptly suspending him. Again, the workplace to which

Ortho invited her to return was the one in which she had prospered for ten years prior to Mykytiuk's employment, and with the added security Ortho had provided by removing him.

The Court of Appeals properly applied the principles of *Ellerth* and *Faragher* to hold that Walton's May 2000 termination did not deprive Ortho of the affirmative defense as to its supervisor's earlier conduct. It then held that the record evidence supported the application of both prongs of the affirmative defense—that Ortho had acted reasonably to prevent and correct the sexually harassing behavior, and that Walton had unreasonably failed to afford herself of Ortho's complaint procedures or to otherwise avoid harm.

Now, Walton contends that the Court should review the Court of Appeals' decision to determine whether *the sexual harassment itself* (or some of it) was a tangible employment action. She argues that an employee should not even have to face the affirmative defense (*i.e.,* should be entitled to a finding of a tangible employment action as a matter of law) if the sexual harassment renders the employee disabled and she did not act unreasonably in failing to report sexually harassing acts prior to a rape. This argument was raised for the first time in Walton's reply brief in the Court of Appeals. For that reason, the argument was not considered by the Court of Appeals, *see Walton*, 347 F.3d at 1283 n.10, and cannot serve as a basis for certiorari review by this Court. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 33-35 (2001).

Moreover, even assuming such a theory might have substance on another record, this case does not present it. The Court of Appeals' description of the "unreasonableness" of Walton's failure to report the harassment after it began in June illustrates this point:

> Had Walton notified Ortho officials in June, when the harassment initially began, most of the incidents complained of could have been avoided. Instead, after

> Mykytiuk had groped her breasts and buttocks and tried to kiss her the day after he promised to behave, Walton claims that she went back to his apartment over a week later, knowing that he was intoxicated, had wine with him, and was then subjected to the more serious incident of sexual assault. Indeed, she admits returning to the apartment the following week, accepting wine again, and lying down on the floor to be massaged, whereupon she alleges that she was sexually assaulted again. . . . Here, Walton could have avoided most, if not all, of the actionable harassment by reporting Mykytiuk's behavior to Ortho officials. By failing to do so, Walton did not give Ortho the opportunity to address the situation and prevent further harm from occurring.

Walton, 347 F.3d at 1290. Walton's "argument" in her petition is merely an expression of her disagreement with these findings of the Court of Appeals, and does not support an issue appropriate for the Court's review.[10]

In summary, the question presented by Walton does not warrant certiorari review because it was not properly advanced below, and because the uncontroverted facts establish that Walton had sufficient time, notice and protection after the first two instances of Mykytiuk's misconduct, to obtain prompt, effective and complete

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[10] The only two cases Walton cites in her petition address situations where the courts have already found the affirmative defense to apply because there is no tangible employment action, and are evaluating whether the employee's failure to avoid harm (the second prong of the defense) is excusable because of the suddenness of the event. As the Court of Appeals recognized, the theory addressed in those cases—sometimes called the "sudden sexual harassment" theory—was not raised in the district court. *Walton*, 347 F.3d at 1291. Moreover, it provides no support for Walton's request that the Court review the analytically distinct issue of whether she suffered a tangible employment action and is not supported by the facts of this record.

protection. As this Court has held, that is the core purpose of Title VII and Ortho's conduct was sufficient to that purpose.

II. THE PETITION DOES NOT AND CANNOT SHOW ANY CONFLICTAMONG THE COURTS OF APPEAL

The petition also should be denied because Walton does not and cannot show any conflict between the Court of Appeals' decision here and any decision of the other Courts of Appeal, nor does she identify any important or controversial federal question raised by the decision. In fact, the factual circumstances of the case and the legal argument presented by Walton below (in which the plaintiff claims to have been disabled as a result of the harassment, but cannot and does not claim constructive discharge) do not often appear in reported decisions.[11]

Other Courts of Appeal have considered the analogous situation where a plaintiff has been terminated after having been harassed, but the harassing supervisor played no role in the decision to terminate. Those decisions are consistent with the decision here in finding that the sexual harassment did not culminate in a tangible employment action. *See Johnson v. West*, 218 F.3d 725, 730 (7th Cir. 2000) (employee's termination after having been subjected to sexual harassment was not a culminating tangible employment action because: (1) supervisor did not use his authority to get employee fired; (2) he was not her supervisor at the time of her termination; and (3) he played no role in the decision to discharge plaintiff); *Casiano v. AT&T Corp.*, 213 F.3d 278 (5th Cir. 2000) (harassed employee did not suffer tangible employment action when he was rendered ineligible to participate in management program based on poor evaluation because his

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[11] A district court decision from Kansas was decided consistent with this case. *See Desmarteau v. City of Wichita*, 64 F.Supp. 2d 1067, 1078-79 (D. Kan. 1999).

participation was blocked not by evaluation from supervisor who harassed him, but by another supervisor's subsequent evaluation).

CONCLUSION

The decision in this case did not deviate in any way from the established law of employer liability for harassment. The only thing remarkable about this case is Walton's own behavior in failing to report Mykytiuk's initial kisses and sexual touchings when they occurred, and, instead, continuing unnecessarily to place herself in situations that permitted further harassment, including two alleged rapes. The Court of Appeals properly dealt with the facts of this case under the principles of *Ellerth* and *Faragher*. No further review of the Court of Appeals' decision is warranted. For all of the reasons set forth herein, Ortho requests that this Honorable Court deny the petition.

Respectfully submitted,

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